

1956

Present : K. D. de Silva, J., and Sansoni, J.

RATGAMA PANNASEKERA NAYAKA THERO,
Appellant, and H. A. CALDERA *et al.*, Respondents

S. C. 350—D. C. Colombo, 148/7

Charitable trust—Beneficiary's right to rents and profits—Enforcement—Trusts Ordinance, ss. 57, 63.

The 2nd and 3rd defendants, who were appointed as trustees to administer a charitable trust "for the sole use and for the purposes of defraying expenses for the support" of a Vihare, gave an informal lease of a portion of the trust property to the 1st defendant. It was possible to contend that the lease was an improvident one or that it amounted to a breach of trust. The plaintiff, who was the Viharadhipathi of the temple, instituted the present action for a declaration that the lease was null and void and to obtain an injunction restraining the 1st defendant from acting under the lease. He also claimed damages.

Held, that the action was maintainable under section 57, read with section 63, of the Trusts Ordinance.

APPPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *R. de Zoysa* and *M. L. S. Jayasekera* for the plaintiff appellant.

H. Wanigatunga, with *E. A. D. Atukorale*, for the 1st, 2nd and 4th defendants respondents.

Cur. adv. vult.

July 3, 1956. K. D. DE SILVA, J.—

One Don Magris de Silva Tillekoratne by his Last Will No. 954 dated 17.12.1855 (P1) created a Charitable Trust in the following terms:—

"I give and bequeath all the produce, rent and issues and income of the garden, situate at Borella on the high road within the gravets of

Colombo, bounded on the North by the road leading to Slave Island on the South by a road, on the East by a road leading to Maragahawatta *alias* Kainatta and on the West by the Cinnamon Garden for the sole use and for the purpose of defraying expenses for the support of the Buddhist Temples called Dadalle Walukarama Vihare situate at Dadalla and Ambagahapitiya Pansala both situate in Galle District and for the purpose of defraying expenses to keep a lamp light burning from 6 p.m. to 6 a.m. during two nights in every month in the Kelaniya temple which should continue during the continuance of the said Temple”

This Last Will was admitted to probate. In D. C. Colombo Case No. 353 (Special) the 2nd and 3rd defendants were appointed trustees to administer this Charitable Trust. The plaintiff is the Viharadhipathi of Walukarama Vihare. The 2nd defendant is the Viharadhipathi and the 4th defendant is the trustee of Ambagahapitiya Pansala. The 2nd and 3rd defendants by informal agreement dated 10.10.1953 marked A purported to lease to the 1st defendant an extent of 3 roods and 10 perches of the land which is the subject matter of the trust at an annual rental of Rs. 25 for the purpose of putting up a school building. This informal lease also provided that the 1st defendant was also to pay to the lessors a sum of Rs. 10 for each coconut tree he may have to cut down to enable him to put up the building. It further provided that the lessee and his heirs were entitled to the school as long as it was conducted by them. But in the event of the lessee dying without heirs the school and the buildings were to become the property of the temple. The plaintiff instituted this action for a declaration that the said lease was null and void and to obtain an injunction restraining the 1st defendant from felling the trees or putting up buildings on the land. The plaintiff also claimed damages. The 1st, 2nd and 4th defendants filed answer denying, *inter alia*, the right of the plaintiff to maintain this action. Of the several issues framed at the trial the learned District Judge, on the motion of the Counsel of the 1st, 2nd and 4th defendants, proceeded to try issues 7 and 8 as preliminary issues. These two issues are the following:—

Issue No. 7. Is the plaintiff entitled to have and maintain this action against the 1st defendant?

Issue No. 8. Does the plaint disclose a cause of action against all or any of the defendants?

The learned District Judge held that the plaintiff was entitled only to the produce, rents and income from the garden and had nothing whatever to do with the landed property and that the persons who were liable to give the plaintiff his rents and income were the trustees. Accordingly he answered both issues against the plaintiff and dismissed his action with costs. The order made by the learned District Judge in my view is clearly wrong. A perusal of the informal lease P1 shows that its terms are rather detrimental to the interests of the beneficiaries one of whom

admittedly is the plaintiff. The land in question is situated in a residential part of the City. It was stated by Mr. Jayawardene from the Bar that the property is a very valuable one. I have no reason to doubt that it is so. The felling of the coconut trees would naturally reduce the income and might diminish the value of the land. Already forty coconut trees have been cut down. The extent of the land leased is 3 roods and 10 perches but the annual rental payable is only Rs. 25. Section 57 of the Trusts Ordinance (Cap. 72) states :—

“ The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust property. ”

The rents and profits contemplated by this section must mean reasonable rents and profits and not a ludicrous rent. According to section 63 of the Trusts Ordinance the beneficiary has a right to compel a trustee to perform his duty and restrain him from committing any contemplated or probable breach of trust. It may well be contended that a lease such as the one in question amounts to a breach of trust or that it is an improvident lease. These are questions of fact which have to be decided on evidence. If they are answered in favour of the plaintiff he would be entitled to maintain the action. I would therefore allow the appeal and set aside the order made by the learned District Judge. The case would now proceed to trial on all the issues already framed. The 1st, 2nd and 3rd defendants will pay the costs of this appeal to the plaintiff.

SANSONI, J.—I agree.

Appeal allowed.
